U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: December 8, 1997
Case No.: 95-INA-00451

In the Matter of:

THE FRENCHWAY, INC.,
Employer

On Behalf Of:

SIMON BITTON,
Alien

Appearance: Eliezer Kapuya, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 14, 1993, The Frenchway, Inc., Employer, filed an application for alien employment certification to enable Simon Bitton, Alien, to fill the position of Buyer, Men's Clothing, Close-out for the European markets. The duties of the job were described as, "[w]ill purchase varieties of men's clothing (close-out) from various manufacturers and factory outlets for resale." The Employer required that applicants have two years of experience in the job offered (AF 40).

The CO issued a Notice of Findings (NOF) proposing to deny certification on August 15, 1994 (AF 34-38). The CO stated that the Employer's corporate status was suspended as of September 1, 1992. Therefore, the Employer must explain why the corporation was suspended and submit documentation that there is an ongoing business and that an unfilled job opening exists.

The CO further stated that it appears that U.S. workers were rejected on the basis of undisclosed job requirements. The Employer was directed to document that Teodora McGreehan and David G.H. Ho were rejected because they lacked the two years of experience requirement specified in the ETA 750, Part A.

The CO stated further that the wage amendment to the ETA 750 does not appear to have been made by the signator of the document; that the signature on the amendment appears to be that of the Alien. The Employer was directed to file a properly signed wage amendment.

The CO stated further that it appears that U.S. applicants were interviewed and considered by someone other than the signator of the ETA 750, Part A; that it appears that the Alien or someone else signed the letters inviting U.S. workers for interviews and signed the recruitment report. The CO stated that the record does not demonstrate that anyone other than Richard Benichou is eligible to sign on behalf of Employer. 20 C.F.R. § 656.20(b)(3)(I). The Employer was directed to submit the names of officers or employees who have hiring authority, along with samples of their signatures.

On September 14, 1994, Counsel for the Employer, Eliezer Kapuya, requested a 60-day extension in which to rebut the NOF, on the grounds that the Employer was waiting for a letter from its Attorney regarding the Company's corporate status (AF 27).

A second Attorney, William Katz, submitted a letter dated September 14, 1994, to the CO, with copies of September 2, 1994, letters addressed to the Franchise Tax Board and the

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number. We also note that page 94 (AF 94) (page 2 of ETA 750B) is missing from the Appeal File. However, the Alien's qualification are not relevant to the issues decided here, and the omission is harmless.

Secretary of State in Sacramento, California (AF 28-33). Mr. Katz stated in his letter to the CO that the Employer's former accountant had failed to pay the necessary state taxes which had resulted in the suspension of the Corporation by the State Tax Board. Counsel stated that a new accountant had been hired and efforts were being made to reinstate the Corporation.

The CO sent a letter dated September 23, 1994, to Mr. Kapuya asking if he is still Employer's Counsel or if Mr. Katz is Employer's Counsel. The CO stated that he could not honor Mr. Kapuya's request for an extension of time if he is not Employer's Counsel and that if Mr. Katz is Employer's Counsel, he must file a G-28 form.

The Employer responded on September 29, 1994, stating that Mr. Kapuya is the Attorney of Record, even though his personal Attorney prepared the rebuttal.

On October 27, 1994, the CO notified the Employer that due to its failure to rebut the NOF within 35 days, the NOF had become the final decision denying labor certification. However, the CO subsequently issued a Final Determination on December 1, 1994, denying labor certification, stating that the Employer's rebuttal had been timely filed, but administratively mishandled. The CO retracted the October 27, 1994, denial (AF 3-5).

In denying certification, the CO referred to Mr. Katz's letter of September 14, 1994, and stated that the Employer did not show the existence of a job opening to which U.S. workers could be referred, and failed to submit documentation to support any of its assertions. The CO further stated that the Employer failed to document that the two U.S. applicants had been rejected for failure to meet the requirements set forth in the ETA 750, namely, two years of experience as a buyer; and that on rebuttal the Employer discussed that it prefers that applicants have a foreign language. The CO also stated that the Employer failed to submit a properly executed wage amendment and a list of the names of officers or employees who have hiring authority along with samples of their signatures.

The Employer, by Counsel, requested administrative-judicial review on December 8, 1994 (AF 1). Included in the request was a September 14, 1994, letter in which the President stated that the requirements for the job were:

> Experience as a buyer of men's clothing, for minimum 2 years.
> Experience on the European market (clothing area).
> Knowledge in European brand names, (Market price....).
> Experience in the clothing quality (fabric, fashion, material, cutting, sewing...).
> Availability to travel, anytime, any length of time....
> Contacts in Europe preferable.
> Preferable also, another foreign language, as French, Italian, or Spanish....

(AF 19).

Included also was a letter in which the Employer stated that he rejected Ms. McGreehan because she had no experience as a buyer and does not know the European market; that Mr. Ho was rejected because he did not call the Employer and has no European experience (AF 20).

Discussion

The CO was correct in denying the requested labor certification for the reason that the Employer evaluated the U.S. workers using undisclosed requirements. An employer generally may not reject a U.S. worker based upon an undisclosed job requirement. *United Const. Weather Proofing Co.*, 92-INA-172 (Mar. 26, 1993) (scaffolding work not listed in application or advertisements); *United Calibration Corp.*, 91-INA-75 (Mar. 24, 1993) (employer improperly rejected a U.S. worker for failure to have taken specific courses where the employer only stated that it required an academic degree); *Armando's Italian Restaurant*, 92-INA-51 (Mar. 23, 1993) (experience in preparing Italian dishes not listed for the position of lead waiter); *M.K. Catering Consultants, Inc.*, 92-INA-10 (Jan. 29, 1993) (rejection unlawful where requirement that experience specifically be with Indian cuisine not stated); *Lorenzana Foods Corp.*, 92-INA-20 (Jan. 26, 1993); *L.M.C. Corp.*, 91-INA-34 (Jan. 26, 1993); *Travers Associates, Inc.*, 91-INA-115 (Jan. 6, 1993); *Electronic Development Corp.*, 91-INA-343 (Dec. 16, 1992).

Here, the Employer listed the job requirements on the ETA 750 as two years of experience purchasing men's clothing from various outlets and manufacturers. Yet, in a September 14, 1994, letter to the CO, the Employer stated that the job requirements included experience in the European clothing market, knowledge of European brand names, and availability to travel anytime, for any length of time. In addition, the Employer stated preferences for a foreign language and European contacts. This Board has held that employer preferences are actually job requirements. *Southern Connecticut State University*, 90-INA-384 (Dec. 9, 1991). The record reflects that the Employer used these unstated job requirements to evaluate the U.S. applicants (AF 20).

The rejection of certification is also supported by the Employer's failure to provide the amended wage data signed by the person who signed the ETA 750, the list of Employer's officers, and employees empowered to conduct employee recruitments and samples of their signatures. An employer must provide relevant information requested by a CO. *Gencorp.*, 87-INA-659 (Jan. 13, 1988) (*en banc*). This information was relevant inasmuch as the signatures on documents being filed with the CO did not match the signature of the Employer's President on the ETA 750. In fact, the signatures on the wage amendment appeared to be the same as the Alien's signature.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not

favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.